IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1237

THE CONCORD COMPANY, A CORPORATION,
Petitioner (Plaintiff-Appellant),

vs.

WALTER R. WILLCUTS, RUTH WILLCUTS AND CECIL H. DEIGHTON, AS EXECUTORS OF THE WILL AND ESTATE OF L. M. WILLCUTS, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES, *Respondents (Defendants-Appellees).*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The Concord Company, a corporation, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered February 9, 1942, in the above case affirming a judgment of the United States District Court for the District of Minnesota, dismissing plaintiff's action, and accompanies this petition by certified transcript of the record and proceedings in the court below and by its brief supporting this petition.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This is an action by petitioner, The Concord Company, a Delaware corporation, against L. M. Willcuts, Collector of Internal Revenue, after whose death Walter R. Willcuts and others, as executors of decedent's will and estate, were substituted as parties defendant, to recover $29,042.34, the amount of a deficiency income tax assessment for the taxable year ending February 28, 1930, paid by petitioner under protest.

In 1929, petitioner was the owner of 30,000 shares of the common stock of Cream of Wheat Company, which it received through non-taxable exchange of 20 shares of its own stock for 20 shares of Cream of Wheat stock in 1922, the total 400 shares of stock originally issued by Cream of Wheat having been split up in 1929, through non-taxable transactions at the ratio of 1,500 new shares for each original share. 13,110 shares of the resulting 30,000 shares were sold by plaintiff during its taxable year ending February 28, 1930, for $484,545.10, and petitioner, in putting its gain from the sale in its income tax return for the taxable year, put the March 1, 1913, fair market value of the stock sold at $345,000.00, and returned the difference of $139,545.10 as an item of taxable gain for gross income.

The Commissioner of Internal Revenue determined the March 1, 1913, fair market value of the stock sold to be $136,663.27, thereby resulting in a gain from the sale of $347,881.82, and in a deficiency in tax, the amount of which is involved in this proceeding.

The matter was tried to the Court and jury on a stipulation of facts and on extensive oral and documentary evidence adduced at the trial.

The only issue between the parties in this litigation is,

what was the March 1, 1913, fair market value per share of the Cream of Wheat stock involved in this suit? When that figure is determined, the amount of a judgment, if any, in favor of plaintiff and against the defendants, can be computed by the Court and counsel.

It was manifestly impossible to submit any form of general verdict to the jury because such a procedure would require the jury to re-compute the taxpayer's liability under the income tax statutes as they existed in 1930.

Accordingly, as permitted and contemplated by the "Special Verdict" rule, Rule 49 (a) of the Federal Rules of Civil Procedure (28 U. S. C. A., following Sec. 723c) "by agreement between the parties, the only fact issue to be submitted and determined by the jury was as to the March 1, 1913, fair market value per share of the Cream of Wheat stock and the parties agreed that as to all other fact issues, the Court should make its findings of fact; * * *" (Par. 9 of Findings of Fact (R. 770)).

A controversy arose between plaintiff's and defendants' counsel over the form of that special verdict. It was and is petitioner's contention in accordance with the agreement found in the findings of fact by the Trial Court above quoted (R. 770), that there should have been submitted to the jury only one interrogatory:

> "What was the March 1, 1913, fair market value per share (before the 1500 to 1 split-up) of the Cream of Wheat stock in question?"

Defendants' counsel insisted on the submission of another question to be answered first, and the Court, over petitioner's specific objection (R. 742-743), and in conformity with defendants' counsel's request, submitted two questions in the following order, and in the following form:

> "1. Has the plaintiff established by a fair preponderance of the evidence that on March 1, 1913, the fair mar-

ket value of the 400 shares of Cream of Wheat stock was an amount in excess of the value determined by the Commissioner? (.....)

"Note: If your answer to the above question is 'No,' then the following question may be disregarded:

"2. What was the March 1, 1913, fair market value per share (before the 1500 to 1 split-up) of the Cream of Wheat stock in question? ($.....)" (R. 761).

In connection with the submission of question No. 1, and obviously only because question No. 1 was submitted, the Court charged the jury in part:

"That is your first question. Now you will answer that question either 'Yes' or 'No,' and you will find a place in the verdict which states, or wherein you will either answer that 'Yes' or 'No.' If you answer it 'No' then that will end the case, and you need not spend any time in determining the exact value of the Cream of Wheat stock, because if the plaintiff has not sustained the burden of proof, that the Commissioner erred, then that ends the case.

* * * * * * * * *

"Now I wonder if I have made that clear. If you answer this first question 'No'—and you will observe that we have written here a note which says, 'If your answer to the above question is "No" then the following question may be disregarded.' You would not pay any attention to the next question. You would have that verdict then signed by your foreman, dated, and returned to the Court. If your answer is 'Yes' then you will have to determine in light of all this testimony and in light of these instructions that I have given you, what was the fair market value of this stock as of March 1, 1913?" (R. 756-757).

The jury, after having listened to two weeks of complicated testimony involving figures beyond the comprehension of the ordinary individual, took the obviously easy way out, and promptly answered the first question "No." *It thereby avoided a determination of the one and only issue as agreed*

on by the parties and as found by the Trial Court and on which the entire litigation turned, i. e., what was the March 1, 1913, fair market value of the stock in question?

The basic method of defendants' witnesses in determining the fair market value of Cream of Wheat stock was to compare Cream of Wheat Company, whose stock was closely held, with other companies whose stock was listed on an exchange or sold over the counter extensively on or about March 1, 1913. They were unable to express an opinion as to the fair market value of Cream of Wheat stock unless they could compare it with some stock whose price was quoted, and if they had not gone through this mental process of comparing Cream of Wheat Company with other specific companies, they would have been unable to arrive at any opinion of the fair market value of the Cream of Wheat stock (R. 497).

In connection with their opinions they introduced in evidence, over petitioner's repeated objections, numerous graphs and charts which were based on such comparisons (R. 367, 385, 393, 580, 601, 633), and an examination of the companies and of the charts makes it apparent that the properties compared were not of like character and quality, and were not similarly situated or affected by the same causes in so far as Cream of Wheat stock was concerned. There was no substantial similarity in conditions between the companies as to make the opinions or the graphs and charts of any probative value, and their admission in evidence resulted only in a highly prejudicial disproportionate confusion of issues.

Furthermore, one of petitioner's witnesses, F. W. Clifford, over petitioner's repeated objections, was cross examined by defendants' counsel at length on solely collateral matters (R. 523-529). Counsel's inquiry into the witness' personal and family affairs was not for purposes of impeach-

ment or to affect his credibility, and was not for the purpose of laying a foundation for the admission of any evidence otherwise admissible. The cross examination was highly inflammatory and prejudicial.

Subsequent to the jury's special verdict (R. 761), the Trial Court made its findings of fact, conclusions of law and order directing entry of judgment on the special verdict (R. 762-771), and judgment dismissing the action was accordingly entered on July 29, 1940 (R. 772).

The Circuit Court of Appeals—substantially without discussion, and in effect ignoring and emasculating special verdict practice as contemplated by this Court's adoption of Rule 49 (a); in finding an excuse for the prejudicial cross examination, which excuse is contrary to the facts set forth in the record; in refusing to recognize the very basis of the defendants' experts' opinions, charts and graphs, and in ignoring the tests laid down by this Court as to the admissibility of opinions based on such comparisons—on February 9, 1942, in its opinion reported in 125 F. (2d) 584, affirmed the District Court judgment.

STATEMENT AS TO JURISDICTION

Jurisdiction is conferred upon this Court by Sec. 240 (a), Judicial Code, as amended by Act of February 13, 1925, 28 U. S. C. A., Sec. 347 (a), authorizing the issuance of a writ of certiorari to a Circuit Court of Appeals in any case pending therein.

The judgment of the Circuit Court of Appeals was entered February 9, 1942 (R. 886), and the opinion is reported in 125 F. (2d) 584. A petition for re-hearing was denied, without opinion, March 7, 1942 (R. 907).

THE QUESTIONS PRESENTED

1. Was the submission to the jury of the first interrogatory, with directory note:

> "Has the plaintiff established by a fair preponderance of the evidence that on March 1, 1913, the fair market value of the 400 shares of Cream of Wheat stock was an amount in excess of the value determined by the Commissioner?
>
> "Note: If your answer to the above question is 'No' then the following question may be disregarded:"

over petitioner's timely and specific objection, and the Trial Court's refusal to submit to the jury only the single interrogatory, reading:

> "What was the March 1, 1913, fair market value per share (before the 1500 to 1 split-up) of the Cream of Wheat stock in question?"

violative of Rule 49 (a) of the Federal Rules of Civil Procedure?

2. Did the submission of the first question call for a conclusion of law or of mixed law and fact, rather than of an ultimate fact, thereby violating Rule 49 (a)?

3. Is the submission to the jury of the question, in substance, of whether the plaintiff has a right to recover anything from the defendant, proper special verdict practice under Rule 49 (a)?

4. Did the submission of the first question refer merely to an evidentiary fact, *i. e.*, the value of the entire 400 shares of stock, and thereby violate Rule 49 (a)?

5. Was the Trial Court's general charge to the jury and the Trial Court's advising the jury as to the effect of their answer to question No. 1 on the outcome of the suit, violative of the special verdict practice contemplated by Rule 49 (a)?

6. What is the proper special verdict practice in the Federal Courts under Rule 49 (a)?

7. Did the submission of the first question give probative effect and the attribute of evidence and a presumption of correctness to the Commissioner's determination, which had passed out of the case, contrary to the decisions of this Court and of the Circuit Courts of Appeal of numerous circuits?

8. Was certain cross examination of plaintiff's witness, F. W. Clifford, on solely collateral matters and inquiring only into his personal and family affairs, and not for purposes of impeachment or to affect his credibility, inflammatory and prejudicial?

9. Were the opinions of defendants' experts, based solely on attempted comparisons between the unlisted closely held stock of Cream of Wheat Company and listed securities of hundreds of other companies, of sufficient probative value to be admitted in evidence, and thereby made the basis of the levying and collecting of taxes?

10. Were the companies relied on by defendants' witnesses, as compared with Cream of Wheat Company, of like character and quality and similarly situated and affected by the same causes, as required by the rules established by this Court?

11. Were the numerous graphs and charts, received in evidence over petitioner's repeated objections, based on comparisons permitted by the decisions of this and other Courts, or were they too speculative to be of any probative value, thereby resulting only in prejudicial confusion?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision of the Circuit Court of Appeals decided an important question of Federal law—special verdict practice under Rule 49 (a)—which has not been, but should be, settled by this Court.

The decision of the Circuit Court of Appeals has decided the important question of proper special verdict practice under Rule 49 (a), substantially without discussion, in conflict with the provisions of Rule 49 (a), in conflict with the authorities and Court decisions on which Rule 49 (a) is based, and in conflict with its purpose and intent as shown by its adoption by this Court and by the official annotations to Rule 49 (a).

The decision of the Circuit Court of Appeals as to various phases of proper special verdict practice is in conflict with the decisions of other Circuit Courts of Appeal on the same matters.

There should be an authoritative construction of Rule 49 (a).

The decision of the Circuit Court of Appeals as to the admissibility of defendants' experts' opinions, charts and graphs is in conflict with the applicable decisions of this Court.

The decision of the Circuit Court of Appeals gives probative effect and the attribute of evidence and a presumption of correctness to the Commissioner's determination, which had passed out of the case, in conflict with the decisions of this Court and of the Circuit Courts of Appeal of other circuits.

The decision of the Circuit Court of Appeals in approving the submission of the special verdict in the form in which it was submitted, and in approving the Trial Court's charge

to the jury in connection therewith, and in permitting immaterial and highly prejudicial cross examination of one of petitioner's witnesses, so far sanctioned a departure by the lower court from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REFERENCE TO DECISIONS BELOW

The decision of the Eighth Circuit Court of Appeals, 125 F. (2d) 584, appears at R. 876-886, and the findings and decision of the District Court appear at R. 762-771.

GROUNDS OF JURISDICTION

As stated in the petition at page 6, *supra*, jurisdiction is conferred upon this Court by Sec. 240 (a), Judicial Code, as amended by Act of February 13, 1925, 28 U. S. C. A., Sec. 347 (a).

STATEMENT OF CASE

Because the petition at pages 2 to 6, *supra,* outlines a concise statement of the case containing all that is material to the consideration of the questions presented by the within petition for writ of certiorari, further statement is unnecessary.

SPECIFICATION OF ERRORS ASSIGNED AND INTENDED TO BE URGED

The Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that the submission to the jury of the first question, with directory note:

> "Has the plaintiff established by a fair preponderance of the evidence that on March 1, 1913, the fair market value of the 400 shares of Cream of Wheat stock was an amount in excess of the value determined by the Commissioner?
>
> "Note: If your answer to the above question is 'No' then the following question may be disregarded:"

over petitioner's timely and specific objection and the Trial Court's refusal to submit to the jury only the single question, reading:

> "What was the March 1, 1913, fair market value per share (before the 1500 to 1 split-up) of the Cream of Wheat stock in question?"

was not in violation of Rule 49 (a), Federal Rules of Civil Procedure.

2. In holding that the submission of the first question did not call for a conclusion of law or of mixed law and fact, rather than of an ultimate fact, and was not in violation of Rule 49 (a).

3. In holding that the submission to the jury of the first question, in substance being whether the plaintiff had a right

to recover anything from the defendants, was proper special verdict practice under Rule 49 (a).

4. In holding that the submission of the first question did not refer merely to an evidentiary fact, *i. e.*, the value of the entire 400 shares of stock, and thereby did not violate Rule 49 (a).

5. In holding that the Trial Court's general charge to the jury and the Trial Court's advising the jury as to the effect of their answer to question No. 1 on the outcome of the suit was not violative of the special verdict practice contemplated by Rule 49 (a).

6. In holding that the practice indulged in by the Trial Court was in compliance with the special verdict practice contemplated by Rule 49 (a) in the Federal Courts.

7. In holding that the submission of the first question did not give probative effect and the attribute of evidence and a presumption of correctness to the Commissioner's determination, which had passed out of the case.

8. In holding that the cross examination of plaintiff's witness, F. W. Clifford, on solely collateral and irrelevant matters, inquiring into his personal and family affairs, and not for the purposes of impeachment and to affect his credibility, was not inflammatory and prejudicial.

9. In holding that the opinions of defendants' experts which were based solely on attempted comparisons between the unlisted, closely held stock of Cream of Wheat Company and listed securities of hundreds of other companies, were of sufficient probative value to be admitted in evidence and accordingly to be made the basis of the levying and collecting of taxes.

10. In holding that the companies relied on by defen-

dants' witnesses, as compared with Cream of Wheat Company, were of like character and quality, and similarly situated and affected by the same causes, and in holding that the numerous graphs and charts received in evidence over petitioner's repeated objections were based on comparisons which were not too speculative and which did not result only in prejudicial confusion.

ARGUMENT

I.

The Fundamentally Sound Practice of Submitting a Special Verdict to the Jury, and Thereby Permitting the Development of a Scientific and Sensible Procedure for Jury Trial, Free From the Prejudice, Bias, Sympathy and Partisanship Characteristic of the General Verdict, All as Contemplated by Rule 49 (a) of the Federal Rules of Civil Procedure, Should Be Authoritatively Settled by This Court.

(a)

Special Verdict Practice, Rule 49 (a) of the Federal Rules of Civil Procedure; Fundamental Differences Between Special and General Verdicts.

Rule 49 (a) of the Federal Rules of Civil Procedure reads:

> "Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the

> jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."
>
> *Rule 49 (a), F. R. C. P.*, 28 U. S. C. A., following Sec. 723c.

The decision by this Court will be the first authoritative construction of the fundamentally sound special verdict practice under Rule 49 (a) as contemplated by this Court upon its adoption of Rule 49 (a).

As this Court granted writs of certiorari in the recent cases of *Berry vs. United States* (1941), 312 U. S. 450, 61 S. Ct. 637, 85 L. Ed. 945, "*in order to obtain an authoritative construction*" of one of the rules of civil procedure, and granted certiorari in *Conway vs. O'Brien* (1941), 312 U. S. 492, 61 S. Ct. 634, 85 L. Ed. 969, "to examine whether there had been sufficient compliance" with one of the rules of civil procedure, and in *Reconstruction Finance Corporation vs. Prudence S. A. Group* (1941), 311 U. S. 579, 61 S. Ct. 331, 85 L. Ed. 364, "in view of the importance of the procedural problem," so this Court, in the instant case should grant its writ of certiorari to determine authoritatively in this, *a pioneer case*, the proper special verdict practice, as contemplated by this Court's adoption of Rule 49 (a), Federal Rules of Civil Procedure.

A study of the articles of various leading professors and commentators, a number of whom were members of this Court's Advisory Committee on the new Federal Rules of Civil Procedure, and a study of the comments of the Courts which use the special verdict, and on whose system Rule 49

(a) is founded, make it apparent that the special verdict, as distinguished from the general verdict, *is probably the most satisfactory*, and *is undoubtedly the most scientific method, as free from error as possible, of having controverted fact issues determined by a jury.*

> "We come, then, to this position, that the general verdict is not a necessary feature of litigation in civil actions at law, and that it confers on the jury a vast power to commit error and do mischief by loading it with technical burdens far beyond its ability to perform, by confusing it in aggregating instead of segregating the issues, and by shrouding in secrecy and mystery the actual results of its deliberations. Every one of these defects is absent from the special verdict."
>
> *Sunderland, "Verdicts, General and Special"* (1920), 29 Yale L. J. 253.

> "In the final analysis, it is believed that the fact-finding procedure of Rule 49 (a) provides the nearest approach to a scientific method of trial by jury yet evolved. * * * In the hands of the Federal judiciary, the modified special verdict of Rule 49 (a) should give new life to the jury system."
>
> *Ligscomb, "Special Verdicts Under the Federal Rules,"* 25 Wash. Univ. L. Q. 185, 214.

This Court, in adopting Rule 49 (a) patterned it largely after the Statutes of the State of Wisconsin and the decisions of the Wisconsin Supreme Court thereunder.

The Advisory Committee's note to Rule 49 (a) reads in part:

> "Compare Wis. Stat. (1935), Sections 270.27, 270.28 and 270.30; *Green, 'A New Development in Jury Trial'* (1927), 13 A. B. A. J. 715; *Morgan, 'A Brief History of Special Verdicts and Special Interrogatories'* (1923), 32 Yale L. J. 575."
>
> See *Moore's Federal Practice Under the New Federal Rules*, Vol. 3, p. 3096, 28 U. S. C. A., Rule 49, following Sec. 723c.

The best summary of the proper special verdict practice as it should be under Rule 49 (a) is, in fact, a summary of the Wisconsin practice, and is found in a paper prepared by Hon. Gunnar H. Nordbye, the Trial Judge in the within case, in March of 1941, *subsequent to his decision of the within case*, and is entitled, "*Use of Special Verdicts Under Rules of Civil Procedure*," 2 F. R. D. 138:

> "On the other hand, the special verdict submits to the jury either a verdict in the form of special written findings upon each issue of fact, or written questions as to the issues of fact susceptible of categorical or other brief answers. Under the special verdict practice, the Court would not discuss the law except as it might be necessary to explain or amplify the question submitted, nor would he inform the jury as to the effect of their answers on the ultimate disposition which would be made of the case. Under this practice, the jury would make findings of the ultimate facts, not evidentiary facts or immaterial issues, and the Court would apply the law to such facts and enter judgment accordingly. In theory, at least, the jury are called upon to perform the duties of arbiters of fact, free from the prejudice, bias and sympathy, which often result when they are taking ballots on whether the verdict should be in favor of the plaintiff or the defendant. As illustrative of the purpose to emphasize the facts in submitting a special verdict, rather than the parties, the Court is not required to instruct the jury as to which party has the burden of proof. They are simply asked to determine whether, by the greater weight of the evidence, it appears that certain facts are true. That is, it is recognized that the better practice is to point out where the burden lies, not upon whom. It is quite apparent, therefore, that the whole thought behind the special verdict is to free the jury from any procedure which would inject the feeling of partisanship in their minds, and limit the deliberations to the specific fact questions submitted."
>
> *Hon. Gunnar H. Nordbye, "Use of Special Verdicts Under Rules of Civil Procedure,"* 2 F. R. D. 138, 139.

(b)

The Submission of the First Question Was Error Because It Called for a Conclusion of Law or of Mixed Law and Fact, Rather Than of an Ultimate Fact, All in Violation of Special Verdict Practice Under Rule 49 (a).

The decision of the Circuit Court of Appeals fails to perceive that the submission of the first question, reading,

> "Has the plaintiff established by a fair preponderance of the evidence that on March 1, 1913, the fair market value of the 400 shares of Cream of Wheat stock was an amount in excess of the value determined by the Commissioner?"

was, in fact, a submission of a conclusion of law—a submission in effect of a general verdict, *i. e.*, whether the taxpayer was entitled to recover anything from the defendants—all contrary to the universally established special verdict practice.

Without discussion the Circuit Court's only comment on this vital issue is:

> "A third contention that submission of the question constituted reversible error because the court thereby submitted the general issue of the plaintiff's right to recover anything appears to be equally without support in any citation given us" (R. 885-886).
>
> 125 F. (2d) 589.

That the first question is, in fact, the submission of a conclusion of law, and, accordingly, contrary to established special verdict practice, and contrary to the decisions of the Courts of the states using special verdicts, and *in conflict* with the decision of the Circuit Court of Appeals of the Sixth Circuit is apparent from the following authorities:

> "Conclusions of law must not be submitted. To do so would permit the jury to do just what the general verdict allows, namely: dodge or hide the decision of

the actual fact issues. This practice would leave the factual basis of the decision as much in doubt as does a general verdict."

Hyde, "Fact Finding by Special Verdict," 24 Journal of American Judicature Society 144, 148 (Feb., 1941).

"The reason is quite plain. The statute contemplates the right of the party to a separate finding of the jury upon each such specific question of fact. It is the duty of the Court to administer the statute so that the result aimed at be attained. If the Court may refuse to submit such specific questions and simply submit the general question of negligence, then the statute is practically eliminated from the statute book, and in every negligence case two or three general questions covering simply ultimate conclusions of fact and law, and amounting to but little more than a general verdict, will take the place of the findings of specific fact contemplated by the statute."

Rowley vs. C., M. & St. P. Ry. Co. (1908), 135 Wis. 208, 217, 115 N. W. 865.

"The law is that interrogatories must put only questions of fact from which a legal proposition may be deduced.

* * * * * * * * *

"Interrogatory No. 1 did not ask the jury to find whether there was a defect in the crane but required it to ascertain whether the defect could have been discovered by the exercise of ordinary or reasonable care which was a question of law. The same imperfection is found in the others.

"If not questions of law singly, they are mixed questions of law and fact which are improper in interrogatories. *Runyan vs. Kanawha Water & Light Co.*, 68 W. Va. 609, 71 S. E. 259, 35 L. R. A. (N. S.) 430; *Banner Tobacco Co. vs. Luman Jenison, et al.*, 48 Mich. 459, 12 N. W. 655; *Toledo & W. R. Co. vs. Goddard*, 25 Ind. 185; *Louisville N. A. & C. R. Co. vs. Worley*, 107 Ind. 320, 7 N. E. 215."

Carpenter vs. B. & O. R. R. Co. (6 C. C. A., 1940), 109 F. (2d) 375, 379.

Petitioner's position is that the first question called for a conclusion of law or a conclusion of mixed fact and law.

The submission of the first question was the submission of a conclusion of law because it permitted the jury "to do just what the general verdict allows, namely: dodge or hide the decision of the actual fact issues." (24 Journal of Am. Jud. Soc. 144, 148.)

The practice under the submission of the first question leaves "the factual basis of the decision as much in doubt as does a general verdict" (24 Journal of Am. Jud. Soc. 144, 148), and amounts "to but little more than a general verdict" (135 Wis. 208, 217), which takes "the place of the findings of specific fact contemplated by" (135 Wis. 208, 217), Rule 49 (a).

It, accordingly, appears that the writ of certiorari should be granted in the within case, not only to obtain an authoritative construction of Rule 49 (a), but to resolve the conflict between the decisions of the Circuit Court of Appeals for the Sixth Circuit and the Circuit Court of Appeals for the Eighth Circuit.

(c)

The Submission of the First Question Was Error Because It Referred Merely to an Evidentiary Fact, i. e., the Entire 400 Shares of Cream of Wheat Stock Rather Than Those Involved in the Within Proceeding.

The fair market value of the 400 shares or of the entire issued and outstanding stock of the Cream of Wheat Company was not being litigated in this case. The entire company was not for sale. All of the capital stock was not for sale. We were seeking only to determine the fair market value of approximately 8-1/3 shares out of the 400, the value of approximately 2% of the entire stock, not even enough to control the company.

We were seeking to determine the fair market value of stock in retail lots, not in wholesale lots—the price arrived at between a willing seller and a willing buyer of 8-1/3 shares of stock—not of 400 shares.

It has been uniformly held, until the decision of the Eighth Circuit Court of Appeals in the within case, that the submission of a special verdict question which relates only to evidentiary facts rather than ultimate facts is substantial and reversible error. *Monticello Bank vs. Bostwick* (8 C. C. A., 1896), 77 Fed. 123, 126; *Lipscomb, "Special Verdicts Under the Federal Rules,"* 25 Wash. Univ. L. Q. 185, 193; *Sunderland, "Verdicts, General and Special,"* 29 Yale Law Journal 253; *Nordbye, "Use of Special Verdicts Under Rules of Civil Procedure,"* 2 F. R. D. 138, 142.

(d)

Proper Special Verdict Practice Forbids the Court to Advise the Jury in Its Charge as to the Effect of Their Answer to a Question on the Outcome of the Suit.

The submission of question No. 1 gave rise to the Trial Court's error in making a general charge to the jury, and in advising the jury that if they answered the first question "No," then that would end the case, and there would be no necessity of determining the somewhat complicated question of what was the March 1, 1913, fair market value of Cream of Wheat stock in question, on which they had been listening to evidence for two weeks.

The Wisconsin statutory scheme and the decisions of the Supreme Court of the State of Wisconsin on special verdict practice are the bases of Rule 49 (a). See *Green, "A New Development in Jury Trial,"* 13 A. B. A. J. 715; *Ilsen & Hone, "Federal Appellate Practice as Affected by the New Rules of Civil Procedure,"* 24 Minn. Law Rev. 1, 7; *Ad-*

visory Committee's Note to Rule 49 (a), 28 U. S. C. A., following Sec. 723c.

The special verdict practice, stripped of its common law refinements, has had its longest and most consistent development in Wisconsin, and has been incorporated in Rule 49 (a).

As appears from paragraph 9 of the findings of fact of the Trial Court (R. 770), it was agreed between the parties that a special verdict be submitted to the jury in accordance with Rule 49 (a). This, of course, means that the special verdict practice, as developed in the State of Wisconsin and as obviously adopted by this Court in Rule 49 (a), must be followed.

It has been consistently held, not only in Wisconsin, but in the other states using special verdict practice to any extent, that:

> "'It is reversible error for the trial court by instruction to the jury to inform the jury expressly or by necessary implication of the effect of an answer or answers to a question or questions of the special verdict upon the ultimate right of either party litigant to recover or upon the ultimate liability of either party litigant.' *Banderob vs. Wisconsin Cent. R. Co.*, 133 Wis. 249, 287, 113 N. W. 738; *Beach vs. Gehl*, 204 Wis. 367, 371, 235 N. W. 778; *Anderson vs. Seelow*, 224 Wis. 230, 233, 271 N. W. 844.
>
> "There is an abundance of authority to the proposition that it is reversible error for either the court or counsel to inform the jury of the effect of their answer or answers upon the ultimate result of their verdict. If single instances of prejudicial statements and arguments be held reversible error, repeated instances multiply the gravity of the error."
>
> *Pecor vs. Home Indemnity Co. of N. Y.* (1940), 234 Wis. 407, 419, 291 N. W. 313.

The following authorities also specifically so hold: *Meyer vs. Home Ins. Co.*, 127 Wis. 293, 106 N. W. 1087; *Beach vs.*

Gehl, 204 Wis. 367, 235 N. W. 778; *Anderson vs. Seelow*, 224 Wis. 230, 271 N. W. 844; *Humble Oil & Refining Co. vs. McLean* (1926), 280 S. W. 557; *Cannon Ball Motor Freight Lines vs. Grasso* (1933), 59 S. W. (2d) 337; *Green*, "*A New Development in Jury Trial*," 13 A. B. A. J. 715; *Lipscomb*, "*Special Verdicts Under the Federal Rules*," 25 Wash. Univ. L. Q. 185, 202, 206; *Hyde*, "*Fact Finding by Special Verdict*," 24 Journal of American Judicature Society 144, 148 (Feb., 1941).

The Trial Court, in connection with the submission of the first question, charged the jury:

> "That is your first question. Now you will answer that question either 'Yes' or 'No,' and you will find a place in the verdict which states, or wherein you will either answer that 'Yes' or 'No.' If you answer it 'No,' then that will end the case, and you need not spend any time in determining the exact value of the Cream of Wheat stock, because if the plaintiff has not sustained the burden of proof, that the Commissioner erred, then that ends the case.
>
> * * * * * * * * *
>
> "Now, I wonder if I have made that clear. If you answer this first question 'No'—and you will observe that we have written here a note which says,
>
> "'If your answer to the above question is "No" then the following question may be disregarded,'
>
> you would not pay any attention to the next question. You would have that verdict then signed by your foreman, dated, and returned to the Court" (R. 756-757).

Directly contrary to his charge to the jury, the Trial Court subsequently, and in his paper entitled, "Use of Special Verdicts Under Rules of Civil Procedure," stated on this identical point:

> "Under the special verdict practice, the Court would not discuss the law except as it might be necessary to explain or amplify the question submitted, *nor would he inform the jury as to the effect of their answers on the*

> *ultimate disposition which would be made of the case.* * * * In theory, at least the jury are called upon to perform the duties of arbiters of fact, free from the prejudice, bias, and sympathy which often result when they are taking ballots on whether the verdict should be in favor of the plaintiff or the defendant. * * * It is quite apparent, therefore, that the whole thought behind the special verdict is to free the jury from any procedure which would inject the feeling of partisanship in their minds * * *." (Italics ours.)
>
> 2 F. R. D. 138, 139.

The Trial Court thereby admitted error. The charge not only violated the established special verdict practice, but under the circumstances invited the jury to take the easy way out by answering the first question "No"—an invitation for the jury to exercise the simple act of writing the word "No" in order to end the case—a summary determination without a full consideration of the merits—an invitation accepted promptly.

The Trial Court's charge to the jury shows beyond doubt the confusion in its mind between proper special verdict practice under Rule 49 (a) and general verdict practice.

The Circuit Court of Appeal's only comment on this vital and hitherto undetermined issue is, "the objections that it let the jury know what effect their answer would have * * * have been considered" (R. 885). (125 F. (2d) 584, 589.)

Such a summary disposition of this issue clearly warrants the granting of the writ of certiorari because the lower court, by confession, so far departed from the accepted and usual course of judicial procedure, and the Circuit Court of Appeals so far sanctioned such departure, as to call for an exercise of this Court's power of supervision.

II.

The Submission of the First Question Was Error Because It Gave Probative Effect and the Attribute of Evidence and a Presumption of Correctness to the Commissioner's Determination of Value, Which Had Passed Out of the Case.

The first question was worded:

> "Has the plaintiff established by a fair preponderance of the evidence that on March 1, 1913, the fair market value of the 400 shares of Cream of Wheat stock was an amount in excess of the value determined by the Commissioner?"

The figure of value determined by the Commissioner was no evidence of value. It was not in the case as evidence of value. His decision as to value was hearsay, had no weight whatsoever, and could not even be considered, either as evidence of value or otherwise, in view of the fact that the taxpayer had introduced evidence showing that the Commissioner's determination was wrong.

That which no longer existed was given weight as evidence and as having probative effect—something picked out and set up by the Trial Court as a criterion of value which had to be overcome by a fair preponderance of the evidence.

The "*prima facie* correctness rule" of the Commissioner's determination is merely a procedural presumption, one which in this case should not be permitted to hinder, embarrass or influence in any respect whatsoever the jury's job of determining the fair market value of the stock in question.

The Circuit Court of Appeals summarily disposed of this matter with the following two sentences:

> "It is argued for the appellant here that something about the first question put to the jury conveyed to them some implication that the Commissioner's determination of value was presumptively correct. But there were *no words* in the question expressive of such an idea and

the instructions of the court made it perfectly clear to the jury that there was no such presumption to be indulged by them and that the jury was required to make its finding upon the whole body of testimony before it." (Italics ours.) (R. 880.)

125 F. (2d) 586.

This summary and unsatisfactory disposition of this question adds nothing to the word "affirmed" at the end of the opinion.

Since when have "words" rather than substance controlled the disposition of any case in this Court?

The first question more effectively brought into the case the Commissioner's determination and a presumption of its correctness than any mere statement by the Court to the jury that the Commissioner's determination is presumed to be correct. The hurdle set up by the submission of the first question would be much more difficult to overcome than any hurdle set up in any words "expressive of such an idea" "that the Commissioner's determination of value was presumptively correct."

The Court by its summary disposition of this matter and contrary to the established rules refuses to recognize that upon the disappearance of the presumption only one issue remained. That issue was the fair market value of the stock involved and must be decided on all the probative evidence adduced, unhindered, unembarrassed, and uninfluenced in any respect by the Commissioner's determination.

It was the Trial Court's and the jury's function:

> "* * * to try the question of" the fair market value of the stock in question "in this case *de novo*, without in any way being limited to the evidence heard by the Commissioner, and *unprejudiced by any action he* may have taken in the matter." (Italics ours.)
>
> *Fidelity & Columbia Trust Co. vs. Lucas* (1925), 7 F. (2d) 146, 151, cited with approval in *Wickwire vs. Reinecke*, 275 U. S. 101, 105, 48 S. Ct. 43, 72 L. Ed. 184.

Additional authorities with which the decision of the Circuit Court of Appeals is in direct conflict are:

Redfield vs. Eaton (D. C., Conn., 1931), 53 F. (2d) 693, 696.

Wiget vs. Becker (8 C. C. A., 1936), 84 F. (2d) 706, 707-708.

St. Louis Union Trust Co. vs. Becker (8 C. C. A., 1935), 76 F. (2d) 851, 863.

Willcuts vs. Stoltze (8 C. C. A., 1934), 73 F. (2d) 868, 872-873.

Flannery vs. Willcuts (8 C. C. A., 1928), 25 F. (2d) 951, 953.

Gamble vs. Commissioner (6 C. C. A., 1939), 101 F. (2d) 565, 567-8.

Manchester Board & Paper Co. vs. Commissioner (4 C. C. A., 1937), 89 F. (2d) 315, 317.

U. S. ex rel. Scharlon vs. Pulver (2 C. C. A., 1931), 54 F. (2d) 261.

Mobile, Jackson & Kansas City Railroad Co. vs. Turnipseed (1910), 219 U. S. 35, 43, 31 S. Ct. 136, 55 L. Ed. 78.

III.

Prejudicial Cross Examination of F. W. Clifford.

The prejudicial cross examination and plaintiff's counsel's objections thereto appear at length at pages 523 to 529 of the Record, and has in it such questions as the following:

"And is it a fact that you and your wife acquired all of the capital stock of the Chelsea Corporation in exchange for Cream of Wheat Company stock?" (R. 523).

"Well, you got all of the stock, and then you, as I recall it, had two-thirds of the stock issued in the names of your associates, who happened to be your children—is that right?" (R. 524).

"And you receipted for the shares of stock for the children, as trustee?" (R. 525).

"Well, as a matter of fact, the certificates of stock were left right in the stock book, weren't they?" (R. 525).

"Well, you do remember that thereafter you always personally controlled all of the funds of the Chelsea Corporation?" (R. 525).

"Well, you ran the whole show, didn't you?" (R. 525).

"So all of the funds of the Chelsea Corporation went through your personal bank account?" (R. 526).

"And out of that bank account was paid all of your living expenses?" (R. 526).

"In other words, the Chelsea Corporation was not strong enough—" (R. 526).

"But the actual money would be in your personal bank account?" (R. 527).

"Do you mean to say there was not charged against this account, household expenses, including repairs to automobiles, wages of chauffeurs and items of that kind?" (R. 528).

Such examination was of no relevancy whatsoever. In no way could it aid in the determination of any issue in the case. It could not affect the witness' credibility, and could not be made the basis for any impeachment.

It could not be used as a foundation for getting into evidence certain capital stock tax returns which, on their face, were inadmissible. *Wiget vs. Becker* (8 C. C. A., 1936), 84 F. (2d) 706.

This cross examination could do nothing except prejudice, inflame, arouse and incite the jury against the witness and against the taxpayer, and create the erroneous and unfounded impression that the witness and the taxpayer were using family corporations in an attempt to evade taxes.

The sanction by the Circuit Court of Appeals of this highly improper procedure requires the exercise of this Court's power of supervision.

IV.

The Opinions of Defendants' Experts and the Graphs and Charts Received in Evidence in Connection Therewith, and Over Petitioner's Objections, Were Not of Sufficient Probative Value and Were Too Speculative, Resulting Only in Prejudicial Confusion.

As noted above in the Statement of Case, the basic method followed by all of defendants' witnesses in determining their opinion of the fair market value of the Cream of Wheat stock was to attempt to compare Cream of Wheat Company, whose stock was closely held, with other companies whose stock was listed on the stock exchanges or sold over the counter extensively on or about March 1, 1913.

Defendants' witnesses were unable to express an opinion as to the fair market value of Cream of Wheat stock unless they could compare it with some stock whose price was quoted:

> "Q. In order to apply your basic rule, you have to have a stock market quotation price?
>
> A. Well, yes, some price quotation. It might not be on the stock exchange. It might be from some other source, but it is necessary to have a price quotation.
>
> Q. So that is one of the factors—you must have that price and then work from that?
>
> A. That is correct" (R. 497).

Opinions based on comparisons between unlisted closely held stock and listed securities of competitors or of other companies are too speculative to be made the basis of the levying and collecting of taxes.

The decisions recognized in the tax world as leading authorities in determining the fair market value of an unlisted closely held stock, are *Estate of Jacob Fish* (1925), 1 B. T. A. 882; *Geo. D. Harter Bank, Executor* (1938), 38 B.

T. A. 387, and *James Couzens* (1928), 11 B. T. A. 1040, 1163, 1172.

Without citation of these leading cases, and without even a mere reference to them, the Circuit Court of Appeals overrules them. That those decisions have been recognized as law and as determining the administrative action of the taxing authorities is apparent from the fact that the *Couzens* case was referred to by this Court as recently as December 8, 1941, in *United States vs. Kales*, 62 S. Ct. 214, 86 L. Ed. 192.

The Circuit Court of Appeals, in sustaining the admissibility of defendants' charts and opinions and comparisons and conclusions drawn by defendants' witnesses, ignores the controlling rule established by this Court to the effect that the properties compared must be:

> "* * * of like character and quality, similarly situated and affected by the same causes" and "to the extent that any of the witnesses based their opinions upon a knowledge of" sales of property which do not meet these requirements "their evidence should be disregarded."
>
> *Kerr vs. South Park Commissioners* (1886), 117 U. S. 379, 386, 6 S. Ct. 801, 29 L. Ed. 924.

In so doing, the Circuit Court of Appeals has decided an important question of Federal tax law in conflict with the decisions of this Court.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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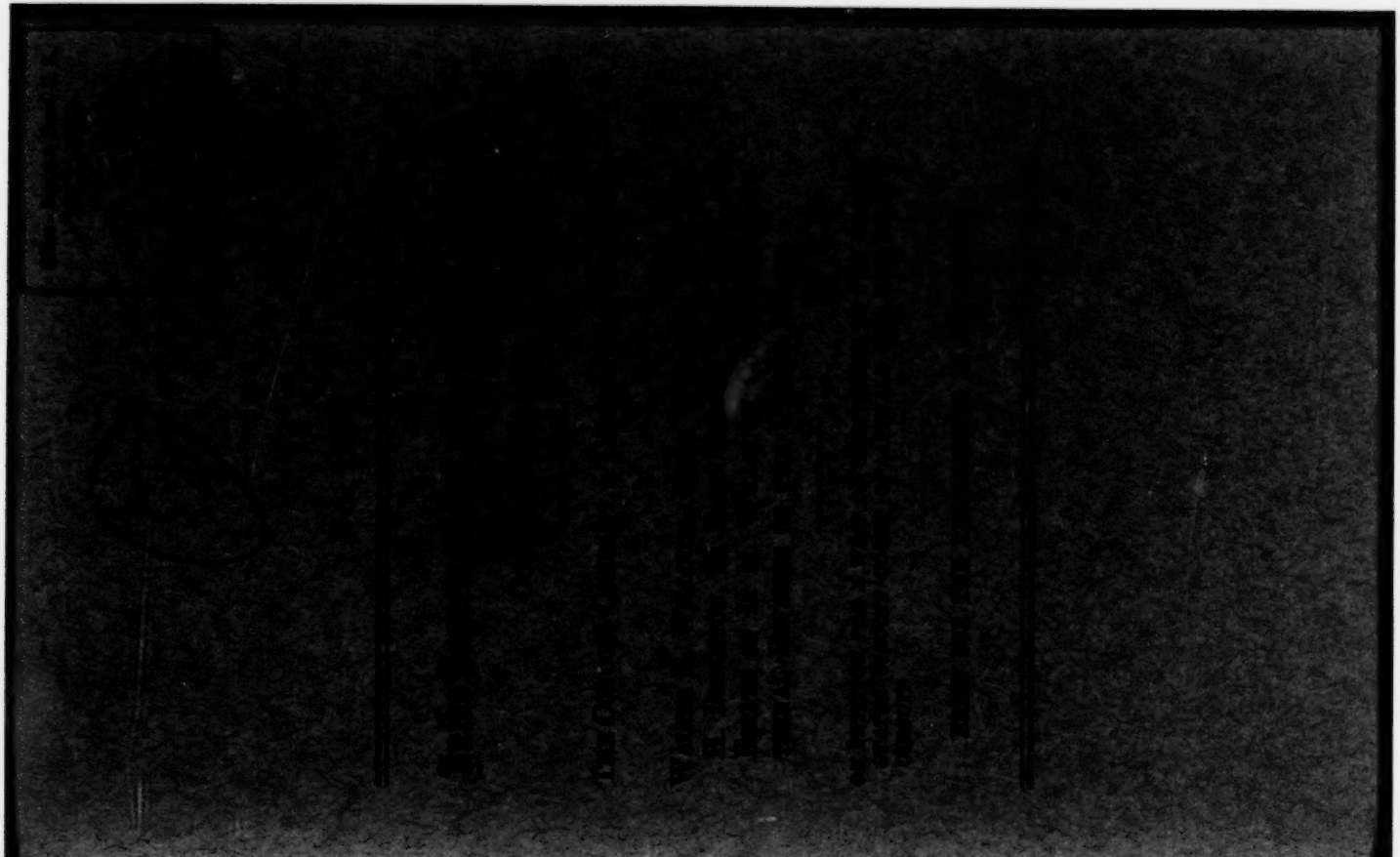
May, 1942.



INDEX

CITATIONS

464766—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1237

THE CONCORD COMPANY, A CORPORATION, PETITIONER

v.

WALTER R. WILLCUTS, RUTH WILLCUTS AND CECIL H. DEIGHTON, AS EXECUTORS OF THE WILL AND ESTATE OF L. M. WILLCUTS, COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The United States District Court for the District of Minnesota rendered no opinion except in overruling the taxpayer's motion for a new trial (R. 840–844). The opinion of the Circuit Court of Appeals (R. 876–886) is reported in 125 F. (2d) 584.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 9, 1942 (R. 886). A peti-

tion for rehearing was filed February 24, 1942 (R. 887–906) and denied March 7, 1942 (R. 907). The petition for a writ of certiorari was filed May 15, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the special interrogatory which the trial court submitted to the jury was valid under Rule 49 (a) of the Federal Rules of Civil Procedure and was appropriate to the jury's decision of the issues.

2. Whether there was any reversible error in the trial court's rulings on the admission of evidence.

STATUTE AND RULE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.
>
> * * * * *
>
> (b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be—
>
> (1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided; or
>
> (2) the fair market value of such property as of March 1, 1913.

whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

Federal Rules of Civil Procedure:

Rule 49. *Special Verdicts and Interrogatories.*

(a) SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

STATEMENT

Petitioner brought this action against L. M. Willcutts, a collector of internal revenue, to recover a deficiency income tax amounting to $29,042.34 with interest assessed against it for the taxable year ending February 28, 1930, and paid by it under protest in 1932 (R. 3–11, 768). The collector died prior to the trial, which was had before a jury, and respondents, who are his executors, were substituted as parties defendant (R. 13–15). The facts pertinent to the questions raised by the petition are not in dispute and may be stated as follows:

In 1922 upon its organization petitioner issued 20 shares of its own common stock to Joseph E. Clifford in a nontaxable exchange for 20 shares of common stock in Cream of Wheat Company. Clifford had owned the shares on and before March 1, 1913. There were on the latter date a total of 400 shares of Cream of Wheat common stock issued and outstanding. They were closely held and not listed on any exchange. The Cream of Wheat Company was reorganized in 1929 and 600,000 shares were issued to the stockholders in place of the 400 previously held by them. Petitioner received 30,000 of these new shares for the 20 old ones it had acquired from Clifford. Thereafter, during its fiscal year ending February 28, 1930, petitioner sold 13,110 of the 30,000 shares for $484,545.60 (R. 769–770).

Petitioner reported a taxable gain of $139,545.60 on the sale of these shares (R. 763). This amount represents the difference between the sale price and $345,000, which petitioner estimated was the March 1, 1913, fair market value of the shares sold computed according to the per share value on that date of the 20 shares then held by petitioner, which it alleged was $37,500 (R. 8). The Commissioner, in making his deficiency assessment, determined that the March 1, 1913, per share value of the 20 shares was only $15,636.53 with the result that the shares sold had a basis of $136,663.27 instead of $345,000 and that, accordingly, petitioner's taxable gain was $208,336.13 more than it reported (R. 764–765, 767).

The parties agreed by stipulation that the March 1, 1913, fair market value of each of the 20 shares was the proper basis to be used in determining petitioner's gain (R. 22–23). They agreed also that the only issue of fact to be submitted to the jury was the issue with respect to such value (R. 770). At the close of the evidence the trial judge charged the jury that petitioner had the burden of proving that the value of the stock was in excess of the value found by the Commissioner (R. 753–754, 756). He concluded the charge with an explanation and submission of the following questions for answer by special verdict (R. 756–758, 761):

> 1. Has the plaintiff established by a fair preponderance of the evidence that on

> March 1, 1913, the fair market value of the 400 shares of Cream of Wheat stock was an amount in excess of the value determined by the Commissioner?
>
> NOTE.—If your answer to the above question is "no," then the following question may be disregarded.
>
> 2. What was the March 1, 1913, fair market value per share (before the 1500 to 1 split-up) of the Cream of Wheat stock in question?

Neither party objected to the charge. However, prior to the charge petitioner objected to the submission of the first question to the jury and contended that only the second question should have been submitted (R. 742, 843).

The special verdict returned by the jury answered the first question "No" and, accordingly, did not answer the second question (R. 761). The trial judge thereupon made findings of fact, which adopted the verdict, and conclusions of law (R. 762–771). Judgment dismissing the action was entered (R. 772) and petitioner's motion for a new trial denied with opinion (R. 840–844). The Circuit Court of Appeals affirmed the judgment (R. 886) and denied a petition for rehearing (R. 907).

ARGUMENT

1. Petitioner contends (Pet. 14–27) on several grounds that the trial court erred in submitting the first question to the jury. The record fails to disclose, however, that any of these grounds was

specified by petitioner when at the trial it objected to the question (R. 742–743). Moreover, none of them is valid.

The first question was framed to put to the jury the precise issue initially presented by the case, namely, whether petitioner had sustained its burden of proving that the stock involved had a greater value than the value found by the Commissioner. See *Wickwire* v. *Reinecke*, 275 U. S. 101, 105; *Reinecke* v. *Spalding*, 280 U. S. 227, 232–233; *Burnet* v. *Houston*, 283 U. S. 223, 227–228; *Welch* v. *Helvering*, 290 U. S. 111, 115. To have submitted only the second question to the jury, in accordance with petitioner's contention (R. 742, Pet. 3), would have been to have ignored the effect of the Commissioner's determination and the petitioner's burden of proof.

The form of the first question did not imply, and the judge refused to charge (R. 741), that the Commissioner's determination was evidence of the value found. Nor was the question improper because, as is contended (Pet. 18–20), it called for a conclusion of law or of mixed law and fact. The issue whether a plaintiff has established a certain fact by a fair preponderance of the evidence, even if it could be said to involve a conclusion of law or a mixed question, is the kind of issue typically submitted to juries. Plainly, Rule 49 (a) of the Federal Rules of Civil Procedure (*supra*, p. 3) contains no provision prohibiting

the court from submitting such an issue for answer by special verdict.[1]

Petitioner argues (Pet. 20–21) that the question answered by the jury was improper for the further reason that it referred to the value of the 400 shares of Cream of Wheat stock originally issued rather than to the value only of the proportion of those shares represented by the 13,110 shares sold by petitioner. However, as was pointed out by the court below (R. 880), petitioner based its claim upon proof of the total value of the 400 shares, from which the per share value could be computed, and, therefore, it was proper and in no event prejudicial for the court to have framed the question as it did in order to present the issue in simple terms which would relieve the jury of making the purely mathematical calculation of the per share value. There is no suggestion that the shares varied in value.

2. In charging the jury, the trial judge explained that if the first question was answered "No" the case would be ended and there would be no occasion to determine the precise value of the stock (R. 756–757). Since petitioner did not ob-

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[1] In *Carpenter* v. *Baltimore & O. R. Co.*, 109 F. (2d) 375 (C. C. A. 6), cited by petitioner (Pet. 18, 19) as being in conflict with the decision in the instant case on this point, the special interrogatories put to the jury did not ask whether certain facts not deemed to involve propositions of law were proved by a preponderance of the evidence. They were held objectionable as calling for legal conclusions with respect to the existence of negligence and contributory negligence.

ject to any portion of the charge, it is in no position now to claim that this explanation of the effect of the jury's answer to the first question was reversible error under Rule 49 (a). Moreover, although in many cases it may be desirable for the jury not to be advised in advance by the court as to the effect of a particular special verdict, the Rule does not require such practice, especially where as in the present case the parties did not attempt to keep the jury in the dark on the matter or to have the court do so (R. 15–33, 38–39, 124, 841). See *Sicard* v. *Albenberg Co.*, 136 Wis. 622, 625–626.

3. Petitioner contends (Pet. 27–28) that the cross-examination of one of its witnesses, F. W. Clifford, was prejudicial in that it tended to incite the jury against petitioner. Again, however, no such contention was made at the trial or could be supported. (See R. 880.) The trial court in its opinion denying the motion for new trial stated that the cross-examination was made in good faith for purposes of impeachment (R. 841) and the court below agreed that no error was shown (R. 880–881).

4. Finally, petitioner urges (Pet. 29–30) that the court below erred in sustaining the action of the trial court in allowing the respondents, over petitioners' objection, to put in evidence certain charts and testimony as to the March 1, 1913, value of the Cream of Wheat stock based on comparisons with the value of the listed stock of competing companies. The authorities relied on,

however, while indicating that such evidence ordinarily may be entitled to little weight, do not hold that it is too speculative to be admitted.[2] The trial judge in his charge reviewed the parties' contentions with respect to the evidence and correctly left to the jury the question whether the competing companies were comparable with Cream of Wheat Company despite that the latter's stock was not listed or sold on the market (R. 749–753). No objection to this action was taken and there was ample other evidence to support the verdict based on facts with respect to Cream of Wheat's history, operations, and financial condition. (See R. 15–33, 881.)

CONCLUSION

The decision of the court below is correct and there is no conflict or other reason for review. The petition, therefore, should be denied.

Respectfully submitted.

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Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
J. E. GARVEY,
Special Assistants to the Attorney General.

JUNE 1942.

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[2] *Estate of Jacob Fish*, 1 B. T. A. 882; *Geo. D. Harter Bank, Executor*, 38 B. T. A. 387, and *James Couzens*, 11 B. T. A. 1040, 1163, 1172.

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